

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KATHRYN MINER, on behalf of
CALVIN SMITH (son),

Plaintiffs,

v.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS,
JON LITSCHER, Secretary, JIM SCHWOCHERT, Administrator,
MARK L. WELSGERBER, Security Chief, SCOTT ECKSTEIN, Warden,
STEVE SCHUELER, Deputy Warden and JOHN KIND, Security Director,

Defendants.

OPINION AND ORDER

17-cv-734-bbc

In this civil action for monetary and injunctive relief, plaintiff Kathryn Miner alleges that she has been barred from visiting her incarcerated son, Calvin Smith, in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165 and §§ 12181-12189. In particular, she alleges that she has a pacemaker and her doctor has instructed her not to be exposed to metal detectors or hand wands, but policies of defendant Wisconsin Department of Corrections require all visitors to state prisons to be subjected to a metal detector or hand wand scanning. As a result, she has been prohibited from entering the Green Bay Correctional Institution where her son is incarcerated, with the exception of one occasion on which a female correctional officer agreed to physically pat and frisk her upon entry.

Because plaintiff is proceeding without prepayment of the filing fee, her complaint must be screened under 28 U.S.C. § 1915(e) to determine whether her complaint is

frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. After reviewing the complaint, I conclude that plaintiff may proceed with a discrimination claim against the Wisconsin Department of Corrections and Jon Litscher under Title II of the Americans with Disabilities Act and the Rehabilitation Act.

OPINION

Congress enacted the Americans with Disabilities Act “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Wisconsin Community Services., Inc. v. City of Milwaukee, 465 F.3d 737, 750 (7th Cir. 2006) (citing 42 U.S.C. § 12101(b)(1), (b)(4)). The Act “forbids discrimination against persons with disabilities in three major areas of public life: (1) employment, which is covered by Title I of the statute; (2) public services, programs and activities, which are the subjects of Title II; and (3) public and private lodging, which is covered by Title III.” Id. (citations omitted). It is well-settled law that state prisons are considered public entities under the ADA, Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 210 (1998) (citing 42 U.S.C. § 12131(1)(B)), so claims of discrimination against a state prison program or service are analyzed under Title II of the ADA.

Although Congress has abrogated states’ Eleventh Amendment sovereign immunity for ADA violations that also constitute federal constitutional violations, it is unsettled law

in this circuit whether suits alleging ADA violations that do not implicate constitutional rights may be brought in federal court. Norfleet v. Walker, 684 F.3d 688, 690 (7th Cir. 2012). In circumstances in which an ADA claim is questionable and a pro se plaintiff has failed to invoke the roughly parallel provisions of the Rehabilitation Act, 29 U.S.C. § 701, et seq., the Court of Appeals for the Seventh Circuit has suggested reading in a claim under the Rehabilitation Act to avoid this tricky abrogation question. Id. Accordingly, I will assume that plaintiff is bringing a claim under both the Rehabilitation Act and the ADA.

To establish a violation of Title II of the ADA, a plaintiff “must prove that [s]he is a ‘qualified individual with a disability,’ that [s]he was denied ‘the benefits of the services, programs, or activities of a public entity’ or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was ‘by reason of’ h[er] disability.” Wagoner v. Lemmon, 778 F.3d 586, 592 (7th Cir. 2015) (citing Love v. Westville Correctional Center, 103 F.3d 558, 560 (7th Cir. 1996) (citing 42 U.S.C. § 12132)).

Plaintiff’s Rehabilitation Act claim is functionally identical, requiring that “(1) [s]he is a qualified person (2) with a disability and (3) the [state agency] denied [her] access to a program or activity because of [her] disability.” Jaros v. Illinois Dept. of Corrections, 684 F.3d 667, 672 (7th Cir. 2012). For the Rehabilitation Act to apply, the relevant state agency (here the Department of Corrections) must accept federal funds, which all states departments of corrections do. Id. at 671.

From plaintiff’s allegations that she has a pacemaker for a heart condition, I conclude that she is arguably a qualified person with a disability under the ADA. 42 U.S.C. § 12102.

Additionally, plaintiff has alleged that the Department of Corrections' policy requiring her to pass through a metal detector or be subjected to a hand scanner means that she is unable to visit her incarcerated son during public visiting hours. This suggests that plaintiff is being denied access to a program or service provided by the Department of Corrections. These allegations are sufficient to state a claim under the ADA and Rehabilitation Act. However, the only appropriate defendant for a claim under the ADA and the Rehabilitation Act is the agency responsible for the regulation in question or its director in his official capacity. Jaros, 684 F.3d at 670 (citing 29 U.S.C. § 794(b); 42 U.S.C. § 12131; Foley v. City of Lafayette, 359 F.3d 925, 928 (7th Cir. 2004)). Therefore, plaintiff will be permitted to proceed with her ADA and Rehabilitation Act claims against the Wisconsin Department of Corrections and Jon Litscher, in his official capacity, but the remaining defendants will be dismissed from the case.

Finally, plaintiff's caption states that she is proceeding "on behalf of Calvin Smith," her son, but her allegations are sufficient only to state a claim on behalf of herself, as an individual with a disability. Therefore, I am dismissing any claims brought "on behalf of Calvin Smith."

ORDER

IT IS ORDERED that

1. Plaintiff Kathryn Miner is GRANTED leave to proceed on claims that defendants Wisconsin Department of Corrections and Jon Litscher have violated her rights under the

Americans with Disabilities Act and the Rehabilitation Act.

2. Plaintiff is DENIED leave to proceed on any other claim.

3. Defendants Jim Schwochert, Mark L. Welsgerber, Scott Eckstein, Steve Schueler and John Kind are DISMISSED.

4. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendants.

5. For the time being, plaintiff must send defendants a copy of every paper or document she files with the court. Once plaintiff has learned what lawyer will be representing defendants, she should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that she has sent a copy to defendants or to the defendants' attorney.

6. Plaintiff should keep a copy of all documents for her own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. If plaintiff's address changes while this case is pending, it is her obligation to inform the court of her new address. If she fails to do this and defendants or the court is unable to locate her, her case may be dismissed for failure to prosecute.

Entered this 8th day of January, 2018.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge